No. 94-42

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1994

ROSS MIDDLEMIST, et al.,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, Bruce Babbitt, et al.,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF OF AMICI CURIAE STATES OF MONTANA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, FLORIDA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WISCONSIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The amici curiae States, through their respective Attorneys General, respectfully submit a brief pursuant to S. Ct. R. 37.2 in support of the petition for writ of certiorari.

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INTEREST OF THE AMICI STATES

The federal judiciary has long had primary responsibility for resolving disputes over state and tribal regulatory authority in Indian country. Most of these disputes have involved the permissible scope of state jurisdiction, but, especially more recently, the Court has been called upon to determine the reach of tribal regulatory power. "In all of these cases, the governing rule of decision has been provided by federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). The central question here is whether, when tribal power is contested, the exercise of federal question jurisdiction under 28 U.S.C. § 1331 should be conditioned on the challenger's first invoking and exhausting tribal administrative and judicial remedies.

The amici States have two substantial interests in how that question is answered. The first is quite practical. Jurisdictional controversies between tribes and States are common. Many are resolved without litigation, but access to a federal court for timely injunctive or declaratory relief can be critical. Although the exhaustion requirement adopted by the courts below presumably will have no effect on a tribe's invoking federal jurisdiction to vindicate the existence of inherent regulatory authority, it can serve to deny States or other nontribal entities a ready federal forum to resolve disputes over tribal regulatory authority. It is a suspect rule which accords one group of litigants the right to immediate federal relief for the purpose of

establishing a power but denies another group such right for the purpose of contesting that power. The second interest is related to the first but goes beyond the mere practical to the federal judiciary's obligation to exercise the jurisdiction over cases or controversies invested in it by Congress. The courts below have extrapolated from *National Farmers Union* and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), the conclusion that any dispute with a tribe or tribal member over "reservation affairs" is subject to exhaustion. That reading distorts the reasoning of those decisions and creates an anomalous exception to the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). In the context of federal-state relations, principles of federalism or judicial efficiency have counseled abstaining from or deferring the exercise of § 1331 jurisdiction in certain instances, yet even those principles have never cut so deeply into that exercise as the exhaustion doctrine fashioned below. The amici are troubled that "an Indian tribe's [administrative law and] judicial system is entitled to a greater degree of deference than the [administrative law and] judicial system of a sovereign State." *Iowa Mutual*, 480 U.S. at 22 (Stevens, J., concurring & dissenting).

SUMMARY OF THE ARGUMENT

The Court has considered and resolved claims relating to the inherent civil regulatory power of Indian tribes over reservation-based conduct of nonmembers without requiring exhaustion of tribal adjudicatory remedies. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,

492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981). Its decision in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985), did not mark a watershed break in this practice but, instead, established only a requirement that, when a tribe's civil adjudicatory power in an ongoing tribal court proceeding is challenged, the exercise of jurisdiction under 28 U.S.C. § 1331 to entertain such claim ordinarily must await conclusion of its presentation to and resolution by the tribal court.

The decisions below expand the *National Farmers Union* exhaustion doctrine to encompass any claim questioning the existence of a tribe's civil regulatory authority over nonmember conduct or lands because such claim is deemed to implicate "reservation affairs." The term "reservation affairs" is taken from *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). There, the Court deferred exercise of diversity jurisdiction over an insurance contract-interpretation claim integrally related to causes of action filed against the federal court plaintiff in a preexisting tribal court proceeding. *Iowa Mutual*, like *National Farmers Union*, represents a limited incursion into the ordinary duty of federal courts to exercise congressionally conferred jurisdiction, not a wholesale repudiation of that duty.

Not only is there no Indian law decisional authority from this Court justifying the decisions below, but they also find no analogue in *Younger v. Harris*, 401 U.S. 37 (1971), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), or their progeny. These decisions seek as a general matter to avoid federal courts' interfering with or duplicating state judicial proceedings. Whatever their precise scope, they do not provide an analytical basis for exhaustion where only a federal law-based claim is involved

and no tribal administrative or judicial proceedings have been commenced.

The Court has stressed repeatedly the federal judiciary's "virtually unflagging obligation" to exercise its jurisdiction. *Colorado River*, 424 U.S. at 817. "Underlying [that obligation] is the undisputed constitutional principle that Congress, and not the judiciary, defines the scope of federal jurisdiction with the constitutionally permissible grounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Federal courts have no dispensation from this general rule merely because a claim challenges a tribe's civil regulatory authority over nonmembers. Unimpeded access to a federal forum is instead particularly essential in such cases because federal courts often provide the only forum in whose impartiality tribes and nonmembers alike repose confidence. The Petition thus presents an important question over the scope of the *National Farmers Union* exhaustion doctrine--a question which should be decided now.

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ARGUMENT

I. *NATIONAL FARMERS UNION* ESTABLISHED A NARROW EXCEPTION TO THE ORDINARY OBLIGATION OF FEDERAL COURTS TO EXERCISE JURISDICTION UNDER 28 U.S.C. § 1331 WHEN PROPERLY INVOKED.

While the Court's decisions concerned with tribal regulatory jurisdiction over nonmembers date back 90 years (*Morris v. Hitchcock*, 194 U.S. 384 (1904)), *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985), was the first case in which the issue of tribal civil

adjudicatory jurisdiction over nonconsenting nonmembers was raised. Two questions were presented in *National Farmers Union*: whether jurisdiction under 28 U.S.C. § 1331 existed with respect to a claim by an insurance company and its insured, a state school district, that a tribal court lacked subject matter jurisdiction to enter and enforce a judgment against the district in an ongoing personal injury action, and, if § 1331 jurisdiction did exist, whether tribal adjudicatory jurisdiction was present. Reversing the court of appeals' contrary conclusion, the Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852. It nonetheless further held that the exercise of § 1331 jurisdiction should be stayed to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" and that only after the federal court plaintiffs' exhaustion of "the remedies available to them in the Tribal Court system" should a federal court address the merits of their challenge. *Id.* at 856, 857. The exhaustion requirement announced in *National Farmers Union* therefore derived directly from a determination that it would be inappropriate to interfere with enforcement of a tribal court judgment, and the associated proceedings to determine its validity, until such court had been given an opportunity to consider the federal court plaintiffs' jurisdictional challenge.

Nothing in *National Farmers Union* suggests it was intended to usher in a new era of federal courts' deferring to tribal administrative and judicial processes all challenges to a tribe's regulatory jurisdiction, even when there exist no tribal proceedings in which the federal court plaintiff is a party or in privity with a party. The subsequent decision in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9

(1987), similarly did not mark a sea-change in the exercise of federal jurisdiction. *Iowa Mutual* differed from *National Farmers Union* because it involved not a challenge to tribal court jurisdiction but a federal diversity action commenced by an insurance carrier to litigate an issue related to liability asserted against it in an ongoing tribal court proceeding. The Court concluded that deferring exercise of federal jurisdiction was appropriate because, "[a]s *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.'" *Id.* at 17. Although *Iowa Mutual* was distinguishable from *National Farmers Union* in important respects (*id.* at 20 (Stevens, J., concurring & dissenting)), it nevertheless was aimed specifically at protecting the integrity of tribal court proceedings initiated before the federal action.[1]

II. THE LOWER COURTS' APPLICATION OF THE *NATIONAL FARMERS UNION* EXHAUSTION REQUIREMENT TO THE PETITIONERS' CLAIMS CONSTITUTES A SUBSTANTIAL

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[1] Although not germane for present purposes, the difference between *National Farmers Union* and *Iowa Mutual* is significant. *National Farmers Union* was a true exhaustion case because the only issue--the existence of tribal adjudicatory jurisdiction--remained subject to relitigation upon conclusion of the tribal court action. In *Iowa Mutual*, however, the insurance contract interpretation issue--the sole claim raised in the diversity suit--could never be entertained unless there was a subsequent determination that the tribal court judgment was void for lack of adjudicatory jurisdiction. *Iowa Mutual*, 480 U.S. at 19. Consequently, despite the Court's remark that "the exhaustion rule announced in *National Farmers Union* applies here as well" (*id.* at 16), *Iowa Mutual*, by committing the merits of the insurance contract dispute to potentially unreviewable tribal court determination, embodies more than a simple exhaustion rule.

EXPANSION OF THAT REQUIREMENT, HAS NO DECISIONAL ANALOGUE AND RAISES A SIGNIFICANT QUESTION CONCERNING THE SCOPE OF THE FEDERAL JUDICIARY'S AUTHORITY TO WITHHOLD EXERCISE OF OTHERWISE PRESENT JURISDICTION.

A.

The courts below have broadened the reach of the *National Farmers Union* exhaustion doctrine to encompass jurisdictional challenges unrelated to an ongoing tribal adjudicatory proceeding. The District Court relied principally on *Burlington Northern Railroad Company v. Crow Tribe*, 940 F.2d 1239 (9th Cir. 1991), and *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1174 (1992), for the proposition that, because the Petitioners' challenge implicates the question whether the Confederated Salish and Kootenai Tribes retain inherent authority to enforce their Aquatic Lands Conservation Ordinance against nonmember landowners, it constitutes "a 'reservation affair' which triggers the mandatory exhaustion requirement." *Middlemist v. Secretary*, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994). That the Petitioners' claim did not bring into question the jurisdiction of any tribal adjudicatory entity in an ongoing proceeding was deemed immaterial.

The Court of Appeals' summary affirmance approved the District Court's application of *Burlington Northern* and *Crawford*. In the first of those cases, the Ninth Circuit required *National Farmers Union* exhaustion with respect to a railroad's claim that a tribe lacked regulatory authority to enforce a common carrier ordinance against its reservation-based activities. The court found unmeaningful the fact that no tribal administrative or

judicial proceedings had commenced, reasoning that, "[i]f . . . [the railroad] suffers from a justiciable imposition of Crow sovereign authority, then its position is substantively no different from the non-Indian defendants forced to exhaust tribal remedies before seeking relief in federal court." *Burlington Northern*, 940 F.2d at 1246. *Crawford* did not arise from a challenge to tribal regulatory or adjudicatory jurisdiction but, like *Iowa Mutual*, presented the question whether a federal court should exercise its diversity jurisdiction over a products liability suit arising from a reservation automobile accident. Notwithstanding the fact that the injured parties had initiated a state court action which had then been removed to federal court and no tribal court proceeding existed, the court of appeals found the district court erred in not "dismiss[ing] or abstain[ing] in favor of tribal court proceedings" (947 F.2d at 1409) when the plaintiffs filed a request shortly before trial for "transfer" of the cases to tribal court (*id.* at 1407). The court stated that in *National Farmers Union* and *Iowa Mutual* "the Supreme Court announced that principles of comity required federal courts to dismiss or to abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court was asserted" and that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.*; *accord Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (directing district court to abstain from exercising diversity jurisdiction over legal malpractice and false representation claim against tribal attorney "because colorable questions are presented in this civil action regarding whether the Colville Tribal Courts have concurrent jurisdiction over alleged tortious conduct that may have commenced on the reservation"); *Duncan Energy Co. v. Three Affiliated Tribes*, 1994 WL 244341 (8th Cir. June 8, 1994) (directing *National Farmers Union* exhaustion as to claim that tribes lacked inherent authority to impose property and gross production taxes or to require nontribal employers to extend hiring preferences to

qualified Indians even in the absence of any ongoing tribal adjudicatory proceeding); *but see Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.) (refusing to require *Iowa Mutual* deferral in diversity action where, inter alia, "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"), *cert. denied*, 114 S. Ct. 621 (1993).

B.

The decisions below and the Ninth Circuit precedent on which they are grounded view themselves as so squarely falling within the scope of the *National Farmers Union* exhaustion doctrine as not to require careful consideration of the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). *National Farmers Union* nonetheless does not stand for the proposition that, merely because a federal court plaintiff challenges a tribe's regulatory jurisdiction, exhaustion of tribal administrative and judicial remedies must occur absent any exception to the exhaustion requirement. *See National Farmers Union*, 471 U.S. at 856 n.21. Accepting such a broad reading of *National Farmers Union* effectively would foreclose immediate federal court access in a class of cases as to which § 1331 jurisdiction indisputably exists and over which federal courts routinely have exercised such jurisdiction. *E.g., South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981).

Here, the sole justification for application of the *National Farmers Union* exhaustion rule is vindication of

tribal self-government and self-determination interests. *Burlington Northern*, 940 F.2d at 1245-46.[7] To use those interests as the basis for broadening the exhaustion doctrine, however, loses sight of the notion that in *National Farmers Union* "the policy of supporting tribal self-government and self-determination" was defined only as "favor[ing] a rule that would provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. The self-government interest at stake in *National Farmers Union* was the tribal court's right to complete adjudication before review of its jurisdictional determination by a federal court. Instantly, the Tribes have asserted their inherent governance powers by enacting the Aquatic Lands Conservation Ordinance which unambiguously extends to the individual Petitioners' lands, and compliance with that ordinance has been required by the Army Corps of Engineers as a condition to obtaining a dredge and fill permit under the Water Pollution Prevention and Control Act, 33 U.S.C. § 1344. It is one thing to say that, once sued in tribal court, a litigant ordinarily must complete that adjudicatory process before seeking to void the tribal court's actions on jurisdictional grounds, but it is quite another to require a litigant to invoke a tribe's

[7] The two other justifications for exhaustion -judicial efficiency and "encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction" (*National Farmers Union*, 471 U.S. at 857) -do not apply when no tribal adjudicatory proceedings are ongoing and only federal law questions are presented. Deferring exercise of § 1331 jurisdiction under those circumstances promotes delay, not efficiency, since initiation of a separate administrative or judicial proceeding in a different forum is necessary. "'Procedural nightmares'" (*id.* at 856) are unlikely to occur in a single, federal action. Where a tribal court has not exercised jurisdiction, the third justification similarly has no play. The "benefits of tribal explanations and expertise" (*Burlington Northern*, 940 F.2d at 1246) can be brought to bear in the federal proceeding in support of the position that, as a matter of federal law, tribal civil regulatory authority exists.

regulatory or adjudicatory jurisdiction for the purpose of arguing that such jurisdiction does not exist. The latter proposition makes no sense and, unsurprisingly, finds no support in a fair reading of *National Farmers Union* or *Iowa Mutual*.

The Court of Appeals' expansion of the exhaustion requirement not only outstrips the analytical reach of *National Farmers Union* but also finds no counterpart in other decisional authority concerned with appropriate exercise of federal jurisdiction. The most closely analogous of such authority is that alluded to in *National Farmers Union* abstention in accord with principles derived from *Younger* v. *Harris*, 401 U.S. 37 (1971)–and in *Iowa Mutual*–deferral in accord with principles derived from *Colorado River*. *National Farmers Union*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 16 n.8. With respect to *Younger*, the Court has said:

> Under *Younger*-abstention doctrine interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. . . . *Younger* abstention is required, however, only when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." . . . In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

Hawaii Housing Auth. v. *Midkiff*, 467 U.S. 229, 237-38 (1984); *accord Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2216 (1992) ("[t]hough we have extended *Younger*

abstention to the civil context. . . . we have never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending nor any assertion of important state interests made"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987) ("Both *Juidice* [*v. Vail*, 430 U.S. 327 (1977)] and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand") (footnote omitted); *see generally* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 349 (2d ed. 1990) ("Perhaps the strongest of the four reasons for *Younger* deference is the desire to avoid interference with the state judicial process. . . . [T]he state retains an inherent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions").

Colorado River deferral is directed at promoting judicial efficiency, not as in *Younger* at furthering federalism, and has tightly restricted range. "[T]he circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818. In contrast to the decisions below which predicate deferral simply on the ground that the Tribes' regulatory jurisdiction has been challenged, *Colorado River* requires the existence of "exceptional" circumstances (*id.*) before "the contemporaneous exercise of concurrent jurisdictions" (*id.*

at 817) will be deemed inimical to judicial administration interests. That such exceptional circumstances do not exist here, where federal law governs resolution of the Petitioners' claims, is underscored by the Court's analysis in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 25-26 (1983), in which *Colorado River* deferral was denied:

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender . . . .

Even if *Iowa Mutual* set a lower threshold for deferral in determining the merits of a nonfederal law dispute where concurrent federal and tribal court proceedings exist, nothing in that opinion indicates deferral is required when only federal law issues are presented and concurrent proceedings do not exist. *See Iowa Mutual*, 480 U.S. at 21-22 (Stevens, J. concurring & dissenting). Indeed, the lack of concurrent proceedings vitiates the very rationale for *Colorado River* deferral: wise judicial administration.

The importance of clarifying the scope of the *National Farmers Union* exhaustion requirement is clear. The decisions below represent an abdication by the federal judiciary of its central role in deciding difficult questions of governmental authority on Indian reservations. The amici

States regularly are confronted with the task of reconciling competing jurisdictional claims on those reservations. This task not only is legally complex but also presents substantial social and political difficulties. Tribes and their members often assert that state forums are insensitive to their interests, and nontribal members voice comparable concerns about tribal forums. Federal courts accordingly remain in many instances the only forum with the perceived ability to resolve jurisdictional questions impartially. The decisions below additionally run counter to the obligation of federal courts to exercise their jurisdiction when properly called upon by litigants to do so. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989); *see also McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The sensitive nature of the federal issues involved here and the unprecedented disregard of the Petitioners' appropriate invocation of § 1331 jurisdiction warrant review.

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CONCLUSION

The amici States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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